# In the Supreme Court
OF THE
# United States

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OCTOBER TERM, 1942

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No.

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JOHN T. REGAN,
*Petitioner,*

vs.

CAMERON KING, as Registrar of Voters in the City and County of San Francisco, State of California,
*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### OPINION BELOW.

The opinion of the United States Circuit Court of Appeals appears in Transcript of Record at page 42.

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### JURISDICTION.

The judgment of the United States Circuit Court of Appeals was entered on February 20, 1943. (R. p. 43.)

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

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**STATEMENT OF THE CASE AND QUESTIONS PRESENTED.**

**(a) Statement of the Case.**

The facts are not in controversy. The facts as found by the Court appear in Transcript of Record at pages 18 to 26, both inclusive, and are stipulated to be correct. (R. p. 32.) The facts so far as need be set out in this summary are that respondent is now and since March 1941 has been the Registrar of Voters of the City and County of San Francisco, and as such is charged with the registration of electors of the State of California who reside therein, and with the care, custody and control of the register of voters therein; that registration is a prerequisite to the right of an elector to vote, including the right to vote for members of the House of Representatives, for members of the United States Senate and for Presidential electors; that such registration is permanent and the name of anyone placed upon such register remains thereon during the life of the registrant and entitles such registrant to vote at all elections held in the City and County, unless such registration be sooner terminated for causes not herein involved, or cancelled upon the production of a certified copy of a judgment directing the cancellation to be made. That petitioner is a citizen of the United States and of the State of California, is and for several years last past has been a resident of such City and County, and is

now and for several years last past has been a duly registered and qualified elector in such City and County and entitled to vote at all elections held therein for members of the House of Representatives and members of the Senate and Presidential electors.

That petitioner has for several years last past regularly voted at elections held in such City and County, and it is his right and intention to so vote at elections hereafter held therein.

That by the Constitution and laws of the United States, and the Constitution and laws of the State of California, the privilege of an elector, including the privilege of voting and of registration, is granted only to citizens of the United States and is withheld from and prohibited to all aliens ineligible to citizenship in the United States.

That among the many Japanese so registered and heretofore so voting and who will continue in subsequent elections to vote are those named at pages 22 and 23 of the Transcript of Record.

That such Japanese have for several years last past customarily voted in such City and County at elections held therein for members of the House of Representatives, members of the Senate and for Presidential electors, and will continue so to do at elections hereafter to be held unless their registration be terminated and cancelled and their names removed from the register of voters.

That the Japanese so registered and so voting were born in the United States.

That it is the right and privilege of the petitioner as a citizen of the United States and of the State of California to have all votes cast by him given their full and true value, force and effect with the votes of all other duly and regularly registered and qualified electors only, all without interference, impairment or denial, by or through persons ineligible to exercise the rights and privileges of electors of the State of California.

That unless the respondent is ordered and directed to strike and remove the names of said Japanese from the register of voters of the City and County of San Francisco, said Japanese will vote at all elections hereafter held in said City and County.

**(b) Questions Presented.**

Petitioner contends that the Japanese in question have been illegally registered and that their names should be stricken from the rolls.

Petitioner contends that Japanese wherever born are not citizens of the United States.

Petitioner contends that the registration of Japanese is illegal and that their names should be stricken from the rolls.

Petitioner contends that the voting by Japanese is an invasion of his rights as a citizen of the United States.

**SPECIFICATION OF ERRORS TO BE URGED.**

The United States Circuit Court of Appeals erred—

(1) In holding that Japanese persons born in the United States are citizens of the United States.

(2) In dismissing plaintiff's action.

(3) In holding that the question here involved had been decided by this Court in *U. S. v. Wong Kim Ark*, 169 U. S. 649, and in *Perkins v. Elg*, 303 U. S. 325.

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## I.

**ARGUMENT AND AUTHORITIES.**

**The Thirteenth, Fourteenth and Fifteenth Amendments to the Federal Constitution.**

About eight months after the surrender at Appomatox the Thirteenth Amendment to the Federal Constitution was adopted by the Congress and was ratified by the required number of States in December 1865. The first sentence of that amendment is:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

If not by President Lincoln's Proclamation of 1863, then by this amendment some three million Negroes theretofore slaves became freemen.

These freemen were for the most part born in the United States, were subject to its jurisdiction but were not citizens, and the great majority of them resided

in the several States which had seceded and which had not yet been readmitted into the Union.

The Fourteenth Amendment was introduced shortly after the close of the Civil War, adopted by the 39th Congress in 1866, and became a part of the Constitution in 1868.

While this amendment covered several subjects, unrelated in character, we are here concerned only with its first sentence reading:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The Fifteenth Amendment was adopted by the Congress in 1869 and became a part of the Constitution early in 1870 and the first paragraph reads:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

It was assumed by those urging these amendments that the ex-slaves, if given the right to vote, would vote the Republican ticket.

We have quoted the pertinent provisions of these amendments because they had a common object and should be considered together. That common object was the citizenship and enfranchisement of the Negro.

These three amendments were intended to deal alone with the Negro. The ultimate object was the enfranchisement of the Negro—to make of him a voter.

No one may question that the Thirteenth Amendment referred alone to the Negro. The Negro was a slave and the Thirteenth Amendment abolished slavery. The Negro thereupon became a subject but not a citizen. The next step in the process was to establish the citizenship of the ex-slave, hence the Fourteenth Amendment. The citizenship of the ex-slave being thus conferred by the Fourteenth Amendment, it was deemed that by express constitutional provision the new citizen should be made secure in the possession and exercise of the rights of the citizen, hence the Fifteenth Amendment which protected the new "citizen of the United States" in "the right * * * to vote".

Was the Fourteenth Amendment intended to apply to the Negro only? Did it intend to include all Asiatics born in the United States?

Let it be assumed that the Thirteenth Amendment had failed of approval by the States. In that event, does any one believe that the Fourteenth Amendment would have been proposed? The Thirteenth Amendment, failing of adoption, there would have been no call for the Fifteenth Amendment, for the Negro, not having the right to vote, would have had nothing to be protected in the States hostile to his citizenship.

The prevailing opinion in the *Wong Kim Ark* case, as to the Fourteenth Amendment, declares:

> "Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free Negroes."

If the word *only* had been used instead of the word "main", the statement would have been in complete harmony with the intention of Congress in proposing the three amendments.

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## II.

### THE REPUBLIC OF THE UNITED STATES—BY WHOM AND FOR WHOM ESTABLISHED.

"Four score and seven years ago, our fathers brought forth on this continent, a new nation * * *"

—*Lincoln's Gettysburg Address.*

This country was settled by white people from European countries. The people who comprised the original Thirteen Colonies, who framed the Articles of Confederation and who administered the government under such Articles were white people from European countries and their descendants who may be called, for lack of a better name, Caucasians. The only people with whom they came in contact who were not white were Indians or Negroes and the latter were slaves.

During the Colonial period there were no Asiatics in this country. Except the Indian and the Negro, the colonists had contact with whites only, and they sought to establish in the New World a government of, for and by white people. The Declaration of Independence was made by white people and catalogued the evils from which they had suffered.

After these people had won their freedom, their basic law, the Articles of Confederation, having proved insufficient and defective, their representatives met for the purpose of strengthening such organic law. That assembly soon arrived at the conclusion that their objectives could not be achieved through amendment or modification of the Articles of Confederation and they then determined that a new organic law should be framed and addressed themselves to the drafting of a Constitution.

After four months of deliberation the Constitution of the United States as it now stands, except for the amendments that have since been added, was adopted. It was adopted as a new and basic law of the Republic of the United States, a government to be composed of the people who had framed it and their descendants, "a government of the people, by the people, for the people". And it was that government to which Lincoln at Gettysburg urged "increased devotion" that it should "not perish from the earth".

Among the many powers conferred upon the Congress by the sovereign people was the power to adopt and provide for an uniform system of naturalization. It was recognized by the framers of the Constitution that other people would wish to come to this land and it was their view that such immigration was desired. They contemplated, however, that those who came would be sympathetic with and supporters of the Republic. They well knew that that sympathy and support for the new government could be best assured by restricting citizenship of those hereafter coming to

Europeans, and that even then, before that privilege should be conferred, those potential citizens should be given here a period of probation, then examined and if found worthy, they should take an oath binding themselves to the support of this government and severing all relations with and all allegiance to the governments from which they came.

Congress exercised its power "to establish an uniform law of naturalization" by providing that "free white persons" might gain through that process the privilege of American citizenship.

Reference to historical facts is not made with any thought that the members of this Court are not with them entirely familiar, but rather to bring them freshly to mind for they furnish an enduring light and he who essays the construction of constitutional provisions without availing himself of such light labors in darkness.

The Constitution was ratified by the requisite number of States on June 21, 1788. On April 30, 1789, Washington was inaugurated President of the United States. The naturalization law extending the privilege of citizenship to white persons only was passed by Congress and approved by the President in the following year. Washington presided at the Constitutional Convention and he was the first to sign the Constitution. As President of the United States he gave executive approval to the law restricting naturalization to white persons. A number of the persons whose names were appended to the Constitution as members of Congress participated in the adoption of that law.

## III.

### UNIFORM NATURALIZATION LAW.

The naturalization law thus adopted in 1790 has been amended a score of times and always Congress has held steadfastly to the original policy. The restriction to free white persons has been adopted in every amendment except in two instances, one occurring in 1870 when Congress in effecting the purposes of the Thirteenth, Fourteenth and Fifteenth Amendments, extended the privilege to "aliens of African nativity and to persons of African descent", and the other, in 1873 when a committee codifying the naturalization laws in its report inadvertently omitted from the provision the words "free white persons" but upon discovery in the following year these words were restored and continue in the law to the present day. It is significant, too, that when it was sought to restore these words to the statute, some members of Congress opposed such action, contending that the time had come to extend the right of naturalization to all peoples of the world. This proposal, however, was overwhelmingly defeated.

The word "free" as used in the Immigration Statute was used in the early enactment because slavery existed at that time and some white persons were held as slaves to some extent in the Colonies and certainly in some of the countries from which these people came. The word no longer has significance and may now be eliminated from consideration.

This situation was recognized by the Supreme Court of the United States and in *U. S. v. Ozawa,* 260 U. S. 178, 198, 67 L. ed. 199, the Court said:

> "Undoubtedly the word 'free' was originally used in recognition of the fact that slavery then existed, and that some white persons occupied that status. The word, however, has long since ceased to have any practical significance and may now be disregarded."

The original statute and all subsequent amendments may be now regarded and construed as though the word "free" had never been used.

By the uniform naturalization law Congress has never extended the privilege of naturalization to other than white persons, except by the provision adopted in 1870 providing for the naturalization of Negroes and by special acts extending the right to Filipinos and Puerto Ricans who had served in the armed forces of the Union.

We have called to the Court's attention the legislative history of the naturalization laws steadfastly pursued by Congress prior to the Fourteenth Amendment and as steadfastly pursued by Congress since that amendment for the purpose of emphasizing the improbability that Congress by the amendment intended any change in the policy which it has steadily pursued during the century and a half of the Republic's existence, except as to Negroes. In fact, it seems clear that Congress did not intend by proposing the Fourteenth Amendment any other change in that policy and if the Fourteenth Amendment has been correctly construed in that regard the change was achieved without Congress intending any such result.

We have referred to the several acts passed by Congress extending naturalization on more favorable terms to "aliens" who had served in the armed forces of the Union. The construction of these acts by the Supreme Court of the United States made subsequent to the decision of the *Wong Kim Ark* case is of special significance.

In 1921, *Toyota v. U. S.*, 268 U. S. 402, 69 L. ed. 1016, Hidemitsu Toyota, a native born Japanese who had served for a number of years in the armed forces of the United States and who had received "eight or more honorable discharges", applied for naturalization in the United States District Court for the District of Massachusetts and his application was granted. Thereafter a proceeding was brought to cancel the certificate of naturalization on the grounds that it had been illegally procured and the District Court held that the applicant was not entitled to be naturalized and entered its decree cancelling the certificate. An appeal having been taken to the Circuit Court of Appeals, that Court certified to the Supreme Court of the United States the two questions involved, (1) whether a person of the Japanese race, born in Japan, may be naturalized under the 7th Subdivision of Section 4 of the Act of June 29, 1906 as amended by the Act of May 9, 1918, and (2) whether such subject may legally be naturalized under the Act of June 19, 1919.

The opinion of the Court after reviewing many of the special acts involved and the decisions of Courts construing them, answered both questions in the negative.

It was the view of the Court that the word "aliens", as well as the words "any person of foreign birth", as used in these statutes, though comprehensive in form, were not to be literally construed but were to be given a meaning that would accord with the policy in reference to naturalization so long pursued. At page 412 of the opinion it is said:

> "The element of color and race included in that section is not specifically dealt with by section 30, and, as it has long been the national policy to maintain the distinction of color and race, radical change is not likely to be deemed to have been intended."

Not only in matters of naturalization has Congress persisted generally in the policy of admitting to citizenship white persons only but that purpose runs through legislation affecting the immigration of colored races. The Chinese Exclusion Law prohibited the immigration of Chinese. In 1917 an act was adopted which prohibited immigration to this Country of the people of a large area in which was included all of India. In 1924 Congress amended the Immigration Law so that it now prohibits the immigration to this Country of all persons "ineligible to citizenship". The Chinese Exclusion Law was passed prior to the decision of *Wong Kim Ark*. The Act of 1917, usually referred to as the Barred Zone Act, as well as the amendment of the Immigration Law of 1924, was passed subsequent to the decision in that case. Thus Congress has evidenced its intention both before and after the *Wong Kim Ark* case to restrict immigration as well as naturalization to white persons.

In *U. S. v. Ozawa,* heretofore cited, the Supreme Court of the United States held that a Japanese was not entitled to naturalization because he was not a white person as that term was used in the naturalization laws. In the following term the Court held in *U. S. v. Thind,* 261 U. S. 206, 67 L. ed. 617, that a Hindu was not entitled to naturalization for the reason that he was not a white person and the Court pointed out that it was not reasonable to assume that Congress did intend to extend naturalization to peoples whose immigration to this Country had been expressly prohibited, the Court saying:

> "It is not without significance in this connection that Congress, by the Act of February 5, 1917, 39 Stat. at L. 874, chap. 29, Sec. 3, Comp. Stat. Sec. 4289¼b, Fed. Stat. Anno. Supp. 1918, p. 214, has now excluded from admission into this country all natives of Asia within designated limits of latitude and longitude, including the whole of India. This not only constitutes conclusive evidence of the Congressional attitude of opposition to Asiatic immigration generally, but is persuasive of a similar attitude toward Asiatic naturalization as well, since it is not likely that Congress would be willing to accept as citizens a class of persons whom it rejects as immigrants."

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## IV.

### DECISION OF THE COURT BELOW IS BASED UPON THE WONG KIM ARK AND THE ELG CASES.

The Circuit Court of Appeals for the Ninth Circuit was of the opinion that all persons born in the United

States were made citizens of the United States by the Fourteenth Amendment "as interpreted by the Supreme Court of the United States in *U. S. v. Wong Kim Ark,* 169 U. S. 649, and a long line of decisions including the recent decision in *Perkins, Secretary of Labor, et al. v. Elizabeth Elg,* 307 U. S. 625." (R. p. 42.)

We have not found the "long line of decisions" but will consider the two cases mentioned.

Wong Kim Ark was a Chinese born in the United States and based his claim to citizenship upon the first sentence of the Fourteenth Amendment of the Federal Constitution. The Supreme Court of the United States approved his claim and declared him to be a citizen of the United States solely because he was born therein.

The decision was made by a divided Court, Justice Gray writing the majority opinion in which five of his associates concurred. Justice McKenna did not participate. A dissenting opinion was submitted by Chief Justice Fuller with whom Justice Harlan concurred. The majority opinion was based upon the single fact that Wong Kim Ark was born in the United States. It did not deal with the question of race or color except in its reference to Negroes and Indians. It ignored the fact that for more than one hundred years Congress in the exercise of its power to adopt uniform naturalization laws had steadfastly restricted the right of naturalization to white people. It made no reference to the objectives of the Constitution as declared in the Preamble of that instrument.

It did not consider the question of fitness or adaptability for American citizenship. As understood and applied by the Court below, it makes potential citizens of peoples of every race, of every color, the adherents to every form of government, however antagonistic to the principles of this Republic. It excludes the principle and practice of selection. It makes citizenship depend alone upon the answer to the question—where born? If this be the law, new standards by which to evaluate the dignity of American citizenship must be found.

The Fourteenth Amendment granted citizenship to all negroes born in the United States but it did not take care of negroes resident in the United States, of whom there were many, born elsewhere. It was, of course, realized that all negro residents in the United States should be given the same status. Negroes were originally brought to the United States and were held in slavery. The United States was responsible for their presence here and for them after their emancipation. The majority in Congress in the flush of victory determined to make them citizens, hence the Fourteenth Amendment. But the Fourteenth Amendment resulted in the division of resident negroes into two classes—those born here and those born elsewhere—making citizens of the one but not of the other. To meet this situation, within two years after the ratification of the Fourteenth Amendment the naturalization law was amended by extending the privilege of citizenship to "aliens of African nativity and to persons of African descent", thus providing a method for the acquirement of citizenship by negroes not born here.

If it had been the purpose of the Fourteenth Amendment to include all colored races, it is reasonable to assume that the naturalization law would have been so amended as to give to other people of color the same privilege as by the amendment was given to the negro. The naturalization law was not then or at any other time amended so as to extend the privilege of naturalization to Chinese or to Japanese, or other colored peoples, residents of but not born in the United States.

As to the Fourteenth Amendment, the majority opinion freely admits that: "its main purpose doubtless was, as has been often recognized by this Court, to establish the citizenship of free negroes", but held that by reason of the universality of the language employed all other peoples were included.

The opinion pointed out that under the common law of England all persons born in that Kingdom, with limited exceptions not here involved, were citizens of the British Empire and held that that law was in force here, and that it should be applied in the construction of the Fourteenth Amendment. The prevailing opinion has been freely and frequently criticized by jurists, lawyers and publicists who concur in the view that the dissenting opinion presents the correct exposition of law upon the question involved.

In the minority opinion at page 709, Vol. 169 U. S., it is said:

> "The framers of the Constitution were familiar with the distinction between the Roman law and the feudal law, between obligations based on territoriality and those based on the personal and

invisible character of origin, and there is nothing to show that in the matter of nationality they intended to adhere to principles derived from regal government, which they had just assisted in overthrowing.

"Manifestly, when the sovereignty of the Crown was thrown off and an independent government established, every rule of the common law and every statute of England obtaining in the colonies, in derogation of the principles on which the new government was founded, was abrogated."

And at page 731, the conclusion arrived at is stated as follows:

"I think it follows that the children of Chinese born in this country do not, *ipso facto,* become citizens of the United States unless the 14th Amendment overrides both treaty and statute. Does it bear that construction; or, rather, is it not the proper construction that all persons born in the United States of parents permanently residing here and susceptible of becoming citizens, and not prevented therefrom by treaty or statute, are citizens, and not otherwise?"

We are not unmindful that a dissenting opinion, however persuasive and however sound, is not the decision of the Court. Nevertheless, not infrequently has it occurred that the views upon which a dissenting opinion were based later became the wisdom of the majority opinion of the same Court, and we think it likely, if the Court be given the opportunity, such result will here follow.

Due regard to the facts involved in the case of *Perkins v. Elg,* 307 U. S. 325, make clear that it is not

a reaffirmance of the doctrine of the *Wong Kim Ark* case and gives no support to the judgment of the Court below.

In *Perkins v. Elg* the facts were, as stated by Mr. Chief Justice Hughes in the first paragraph of the opinion:

> "The question is whether the plaintiff, Marie Elizabeth Elg, who was born in the United States of Swedish parents then naturalized here, has lost her citizenship and is subject to deportation because of her removal during minority to Sweden, it appearing that her parents resumed their citizenship in that country but that she returned here on attaining majority with intention to remain and to maintain her citizenship in the United States."

From this statement of the facts it appears that Miss Elg was doubly, if such a thing be possible, a citizen of the United States. She was a citizen of the United States because (1) She was a white person born in the United States and a citizen thereof at the time of birth under either construction of the Fourteenth Amendment and (2) she was a citizen of the United States under the naturalization laws, her parents being naturalized citizens at the time of her birth. She was a Swede, a white person, a Caucasian, and the Swedes were among the first settlers in this country, participated in the revolution, and in the founding of the new government, and were included within "We, the People of the United States." Indeed, the only question involved was whether Miss Elg's citizenship had been forfeited by reason of the

removal of her parents from the United States and their voluntary expatriation during her minority.

It appeared also that within eight months after she reached majority she returned to the United States and continued to reside therein. Some six years after such return she was threatened with deportation on the claim that she was not a citizen and out of this threat the case arose. The Court without difficulty held that her citizenship had not been lost.

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## V.

**THE EXPRESSION "ALL PERSONS" AS USED IN THE FOURTEENTH AMENDMENT IS GENERAL IN CHARACTER BUT A RESTRICTED MEANING MAY BE GIVEN TO SUCH GENERAL TERMS WHERE NECESSARY TO ACCOMPLISH THE PURPOSES INTENDED.**

General expressions in a constitutional provision will not be literally followed where such construction will not accomplish the purpose intended. In *Ozawa v. United States,* 260 U. S. 178, it is said:

> "It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not

fail. See Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Heydenfeldt v. Daney Gold & S. Min. Co., 93 U. S. 634, 638, 23 L. ed. 995, 996, 13 Mor. Min. Rep. 204."

In *U. S. v. Lefkowitz,* 285 U. S. 452, it is said:

"And this Court has always construed provisions of the Constitution having regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions."

In harmony with the authorities just cited is the recent case of *U. S. v. Classic,* 313 U. S. 299, where it is said:

"For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. Cf. Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Brown v. Walker, 161 U. S. 591, 595, 40 L. ed. 819, 820, 16 S. Ct. 644, 5 Inters. Com. Rep. 369; Robertson v. Baldwin, 165 U. S. 275, 281, 282, 41 L. ed. 715, 717, 718, 17 S. Ct. 326. If we remember that 'it is a Constitution we are expounding', we can-

> not rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose."

Many other authorities might be cited but it is believed that the rule is so well settled that it will not be here challenged.

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## VI.

### THE PREAMBLE OF THE FEDERAL CONSTITUTION.

In the Preamble of the Federal Constitution the great purposes of that instrument are enumerated. It reads:

> "We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

That in case of doubt as to the intention of Congress the Preamble should be resorted to in ascertaining the proper construction to be made of the provision is a rule that admits of no exceptions.

We believe the first reference to the Preamble in a decision of the Supreme Court of the United States was made in *Chisholm v. Georgia,* 2 Dall. R. 419, decided in the February term, 1793. This was the eighth case decided by that Court and the first one in which

a grave constitutional question was involved. Mr. Chief Justice Jay, at page 475 said:

> "Let us now turn to the Constitution. The people therein declare, that their design in establishing it, comprehended *six* objects. 1st. To form a more perfect union. 2d. To establish justice. 3d. To ensure domestic tranquillity. 4th. To provide for the common defense. 5th. To promote the general welfare. 6th. To secure the blessings of liberty to themselves and their posterity. It would be pleasing and useful to consider and trace the relations which each of these objects bears to the others; * * * and to shew that they collectively comprise every thing requisite, with the blessings of Divine Providence, to render a people prosperous and happy; on the present occasion such disquisitions would be unreasonable, because foreign to the subject immediately under consideration."

It is probable that at that time no one was better qualified than the then Chief Justice to speak of the "design" of the framers of the Constitution.

In *Cohen v. Virginia,* 6 Wheaton 264, 5 L. ed. 257, Chief Justice Marshall said:

> "The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the Constitution; and if there be any who deny its necessity, none can deny its authority.
>
> "To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided,

the people of the United States have declared, that they are given 'in order to form a more perfect union, establish justice, insure domestic transquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity'.

"With the ample powers confided to this supreme government for these interesting purposes are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes."

In *Story on the Constitution,* 5th Ed., Chap. VI, Sec. 459, it is said:

"The importance of examining the preamble, for the purpose of expounding the language of a statute has been long felt, and universally conceded in all juridical discussions. It is an admitted maxim in the ordinary course of the administration of justice, that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute. We find it laid down in some of our earliest authorities in the common law, and civilians are accustomed to a similar expression, *cessante legis proemio, cessat et ipsa lex.* Probably it has a foundation in the expression of every code of written law, from the universal principle of interpretation, that the will and intention of the legislature are to be regarded and followed. It is properly resorted to where doubts or ambiguities arise upon the words of the enacting part; for if they are clear and unambiguous, there seems little room for interpretation, except

> in cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the preamble."

In *U. S. v. Classic,* heretofore cited and quoted from, reference is made to the "great purposes which were intended to be achieved by the Constitution as a continuing instrument of government". The great purposes there referred to are the purposes enumerated in the Preamble, and are the same great purposes referred to by Mr. Chief Justice Marshall in *Cohen v. Virginia.*

Only a few months ago in *Ex parte Richard Quirin,* reported in Vol. 87, No. 1 of the Advance Opinions of the Supreme Court of the United States, it was said:

> "Congress and the President, like the Courts, possess no power not derived from the Constitution. But one of the objects of the Constitution, as declared by its Preamble, is to 'provide for the common defense'."

From these authorities, it will be seen that the Supreme Court of the United States has always turned to the Preamble of the Constitution to ascertain constitutional purposes and has construed substantive provisions of the Constitution following so as not to "defeat", but so as to "effectuate the constitutional purpose".

## VII.

### THE GRANTING OF CITIZENSHIP TO JAPANESE IS NOT IN FURTHERANCE OF THE GREAT PURPOSES OF THE CONSTITUTION.

If Japanese citizenship furthers constitutional purposes the extension to them of citizenship is not inhibited. If their citizenship conflicts with constitutional purposes the Preamble prohibits such citizenship. This phase of the subject demands a specification of some of the characteristics of the Japanese people and of the polity of the Japanese government.

Because of racial characteristics Japanese assimilation with whites is as impossible as it is undesirable. Their Emperor is the head of their church as well as the head of the nation. Hence, it may be said that their church is their government and their government is their church.

They believe that a war waged by their Emperor is a just war and that death upon the battlefield makes certain a satisfactory eternity and this religious devotion is translated into military power.

The offspring of Japanese are taught the Japanese faith and the objectives of the Japanese government and are pledged to observance of both. Dishonesty, deceit and hyprocrisy are racial characteristics and it is within the code of Japanese obligations that deceit, dishonesty and hypocrisy shall be employed, practiced and pursued whenever and wherever the result will be to advance the designs of the Empire. The presence of Japanese in the United States has resulted in disturbing evils and this condition is inten-

sified by their ability to exercise the privileges of citizenship. Japan misled and deceived representatives of the United States government into a governmental policy through which Japan obtained from this government and from this country the material aid to build the war machine with which the United States is now confronted.

Japan has always claimed race superiority and has constantly declared that Japan was predestined to rule the world. This fateful doctrine was taught to Japanese children not only in the schools of Japan but in Japanese schools taught by Shinto priests maintained in the United States where children were given the same instruction as given in the schools maintained in Japan. Thousands of Japanese children born in this country were sent to Japan for their education and it is authoritatively stated that there are now in Japan more than fifty thousand Japanese born in the United States and now aiding the Japanese war effort.

It is the Japanese claim that the government of Japan is of divine origin, that the first Emperor was the grandson of the Sun Goddess, and that all succeeding rulers are likewise descended, though in more remote degree of relationship. Upon the founding of the Empire more than 2600 years ago, Emperor Jimmu declared in Imperial Rescript:

> "We shall build our Capitol all over the world, and make the whole world our dominion."

In the modern Japanese military textbook known as "The Army Reader", it is said of this declaration:

"This Rescript has been given to our race and to our troops as an everlasting categorical imperative."

Willard Price in his recently published book entitled "Japan Rides the Tiger", in speaking of this Rescript, at page 201 states:

"This fantastic sense of responsibility is diligently drilled into the mind of every child of the Empire. He grows up believing with every fiber of his being: Japan is the divine land. Japan's emperor is the only divine emperor. Japan's people are the only divine people."

In 1941 on the occasion of the celebration of the 2601st anniversary of the Japanese government, Baron Kiichiro Hiranuma, the Home Minister, indicated faithful adherence to the principles and purposes of the Japanese government. On that occasion he said:

"Japan's national polity is unique in the world. Heaven sent down Niningi-no-Mikoto (grandson of the Sun Goddess) to Kashihara in Yamato Province with a message that their posterity should reign over and govern Japan for ages eternal. It was on this happy day, 2601 years ago, that our first Emperor, Jimmu, ascended the Throne. Dynasties in foreign countries were created by men. Foreign kings, emperors, and presidents are all created by men, but Japan has a Sacred Throne inherited from the Imperial Ancestors. Japanese Imperial Rule, therefore, is an extension of Heaven. Dynasties created by men may collapse, but the Heaven-created Throne is beyond men's power."

Japan's ambition and intention to conquer and rule the world has continued from the founding of the Empire, and proper appraisal of the Japanese character and the purposes of the Japanese government by the United States would have resulted in a policy of dignified firmness, and if such policy had been pursued, probably we would not now be at war with Japan.

The military authorities of the United States determined that, as a war measure, Japanese within the United States, those born here as well as those born elsewhere, should be interned to prevent their rendering aid to Japan's forces.

Through investigations by the military authorities, aided by the investigating departments of the federal government, it was ascertained that this action was necessary because of the mass disloyalty of resident Japanese. The action was taken to prevent these Japanese from aiding behind the lines the Japanese effort to conquer, their threat to destroy, the United States.

This Nation is at war with Japan. Japan seeks the destruction of this government and the subjugation of our people. This condition did not exist in 1866 but it was then a possibility, even a probability. The framers of the Constitution of the United States had no acquaintance with the Japanese and "The People of the United States", as used in the Constitution, did not comprehend Japanese and the naturalization legislation immediately following expressly excluded them. The Preamble of the Constitution ex-

pressly prohibited a subsequent extension of citizenship to the Japanese by constitutional amendment, if such action did not tend to achieve the objectives as stated in the preamble. The record of events since the adoption of the Constitution, including Pearl Harbor, Singapore, Bataan, Guadalcanal, and a hundred other fields and waters in which American citizens have been slaughtered by Japanese proclaim in thunder tones that Japanese citizenship conflicts with the objectives of the Constitution, nor should the execution, the murder of American prisoners of war, but a few days ago disclosed, be overlooked. Let no one conclude that this was an abnormal act of the Japanese government nor that it is unapproved by the Japanese people. These atrocities are not the result of change in the government of Japan or in the Japanese people. These murders were but a normal happening of the Japanese government as created and as maintained for the twenty-six hundred years of its existence. The government of Hirohito is the government established by Jimmu.

When this case was commenced, we to a large extent had to depend upon common knowledge for proof of the correctness of our characterization of the Japanese people and the Japanese government. However, since then there has been issued by the Department of State a book entitled "Peace and War, United States Foreign Policy, 1931-1941", commonly referred to as the "White Book", which we now have before us. In its 144 pages is given a detailed history of the relations existing between the Japanese Empire

and the United States from 1931 to Pearl Harbor. In this history is set forth official communications, proposals, conferences, and conversations between this Government and the Empire of Japan, and this history proves incontestably every assertion we have made in this brief. It presents a record of duplicity, misrepresentation and dishonesty that should shock even the most ardent of Japanese sympathizers. The last of these conferences was concluded about one hour after the assault on Pearl Harbor had begun. The limits of this brief will not permit extensive quotations from this book of disclosure. We cannot refrain, however, from quoting the last expression of Secretary Hull to the Japanese representatives with whom he was in conference while Pearl Harbor was being destroyed, though before the news of the attack had been received. Quoting from page 142, Secretary Hull said to the Japanese representatives:

> " 'I have never seen a document that was more crowded with infamous falsehoods and distortions—infamous falsehoods and distortions on a scale so huge that I never imagined until today that any Government on this planet was capable of uttering them.' "

Japanese citizenship will not aid in forming a more perfect Union.

The vesting in these people of the privileges and immunities of American citizenship will not aid in the establishment of justice.

Domestic tranquility is not insured by their participation in the affairs of this government. On the

contrary, history is replete with evidence that their presence here and their participation in the affairs of this government destroy domestic tranquility.

The fifth column activities of the Japanese on the mainland and in Hawaii and elsewhere establish beyond question that neither their citizenship nor their presence is provision for the common defense.

The history of Japanese activity and an appreciation of their racial characteristics establish clearly that their citizenship in no fashion promotes the general welfare of the people of the United States, and finally,

Neither their presence in the United States, nor their citizenship tends in any fashion to secure the blessings of liberty to ourselves or our posterity.

Their citizenship militates against each of the enumerated objectives.

It is pertinent to inquire here who was included in "ourselves and our posterity". "Ourselves" included those who framed the Constitution and all the people for whose government it was framed. "Ourselves" included white people only—surely it did not include Japanese! The "posterity" of ourselves included white people only—surely those who framed the provision did not contemplate Japanese! The white people of that day did not regard Japanese as their posterity, and by no constitutional or legislative enactment could the term be so expanded as to include them now. Common sense repels the thought that the framers of the Constitution designed to make certain that

the blessings of liberty would be secured to the Japanese people. Had the design, the intent, or the purpose of the framers of the Constitution been considered by the Court in the *Wong Kim Ark* case, it is believed that it would have been declared, with the exception of the Negro, the incident of birth established the citizenship of those people only who were then eligible to become citizens.

We are not unmindful that the Republic of the United States since the adoption of the Constitution has been at war with European nations and that we are now at war with European nations. People from each of these nations were among the first European immigrants to this continent. People from each of the European nations and their descendants—their posterity—participated in all the activities of the Colonial period, in the Revolutionary War, and in the adoption of the Constitution. It was this "We, the People of the United States"—the white people—the American people—who won the independence and established the Republic.

It was doubtless realized that war with the mother countries might in the course of time occur. This was a possibility that could not be avoided. It was a hazard that had to be taken but it was confidently believed by the framers of the Constitution, and the people of the States adopting it, that in such event the people of the United States and their posterity would be loyal to the government they had created.

This case was commenced in the belief that the *Wong Kim Ark* case had been erroneously decided

and it was assumed that a decision of this Court approving the *Wong Kim Ark* case would rule the instant case. Though the lower Courts placed their reliance upon the *Wong Kim Ark* case, we still believe the decision to have been erroneous. In the Courts below, as here, we called attention to the characteristics of the Japanese people and to the form, purposes and policy of their government. We have also pointed out the difference in the characteristics between the two governments and the two peoples and have expressed the view that the citizenship of Chinese born in this country will not conflict with objectives of the Constitution. We think it proper here to suggest that if in the construction of the Fourteenth Amendment the classification of peoples based upon color is not adhered to, it may properly be held that the *Wong Kim Ark* case was correctly decided, it being remembered that there was involved peoples whose citizenship would not tend to defeat constitutional purposes. Such construction of the Fourteenth Amendment would not include Japanese.

It was said in the brief in the Court below "should Wong Kim Ark be overruled, this suit offers no real threat to the Chinese. Congress can in a fortnight pass an act to extend to Chinese born in this country citizenship".

The facts involved in the *Wong Kim Ark* case are not the same as, nor are they similar, to the facts involved in the present case. The difference is not that one is a Chinese and the other is a Japanese. The difference is in the wide dissimilarity of characteris-

tics of the two peoples and of the objectives of their respective governments. Whether the Japanese born in the United States is a citizen of the United States has never been decided by this Court. Indeed, that question has never heretofore been presented to this Court for decision. The question is one of paramount importance deeply concerning this government and our people. The decision of this Court will put at rest a much vexed question and will serve as a guide to those charged with the prosecution of the war, and will make certain future policy in reference to Japanese residents.

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

Dated, San Francisco, California,
April 28, 1943

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